IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 220 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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ZAKIRBHAI ISHAKBHAI NAT - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR SHAILESH C SHARMA for Appellant(s) : 1,
MS DS PANDIT, LD.APP for Respondent (s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 17/08/2007

ORAL JUDGMENT

1. The appellant-orig.accused (hereinafter referred to as 'the appellant') has preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 27th December 2004 passed by the learned

Joint District and Additional Sessions Judge, 4th Fast Track Court, Surat, in Sessions Case No.66 of 2004, whereby the learned trial Judge has held the appellant guilty for the charge offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and ordered the appellant to undergo rigorous imprisonment for three years and a fine of Rs.1000/- for each offence punishable under Sections 363 and 366 of the Indian Penal Code, and in default of making payment of fine, further three months' rigorous imprisonment for each offence. So far as the offence punishable under Section 376 of the Indian Penal Code is concerned, the learned trial Judge has ordered the appellant to undergo rigorous imprisonment for seven years and a fine of Rs.2000/- and in default of making payment of fine, further six months' rigorous imprisonment. The learned trial Judge has ordered to run the said sentences concurrently.

2. Shri S.C. Sharma, learned counsel appearing for the appellant, has taken this Court through the

basic case of the prosecution and the oral as well as documentary evidence led during the course of trial. He has also taken me through the relevant part of the judgment and order where the learned trial Judge has discussed and evaluated the evidence and has submitted that the finding recorded by the learned trial Judge is erroneous and contrary to the accepted principles of law. One crucial document Ex.34 which could not have been even admitted in evidence by the learned trial Judge has been admitted, and has been read as substantive piece of evidence. The learned trial Judge has also not considered one another crucial aspect that there is no evidence of cogent nature as to the age of the victim girl and on the date of examination by medical officer, she was carrying pregnancy of six months. The ossification test also could not be carried out. So the opinion evidence as to the age of the victim was also not available. When it is possible to infer that this is a case of love affair of a teenager girl with the appellant, who was about 20 to 21 years of age, the

learned trial Judge at least could have given benefit of doubt to the appellant herein.

3. There is resistance from Ms.D.S. Pandit, learned Additional Public Prosecutor, appearing on behalf of the respondent-State. It is submitted by the learned Additional Public Prosecutor that the learned trial Judge while linking the appellant with the crime has recorded positive findings against the appellant after discussing the arguments made by the defence side in paragraph no.23 of the judgment and order under challenge. When it was proved beyond reasonable doubt that the victim girl was below 16 years of age and she was kidnapped with a particular intention or motive i.e. for sexual exploitation, the conviction recorded by the learned trial Judge under Sections 363, 366 and 376 of the Indian Penal Code cannot be said to be unreasonable or illegal. It was not possible for the prosecution to produce medical evidence in support of the birth certificate produced vide Ex.34 as the victim girl was pregnant when she

was taken for medical examination. It was not in the interest of the child in the womb of the victim to have radiation, so the doctors were not able to carry out detailed physical examination of the victim. This grave constrain has been rightly appreciated by the learned trial Judge. The victim girl was pregnant and on account of her conduct, if the Court reaches to a conclusion that she was a consenting party even then the act of the appellant was rape within the meaning of Section 375 of the Indian Penal Code. The alleged consent of a minor, a girl below 16 years of age, has no sanctity in the eye of law. For short, according to learned Additional Public Prosecutor, the judgment and order under challenge cannot be said to be bad in the eye of law. However, in response to the query raised by the Court, she has fairly accepted that the Investigating Officer could have collected the original birth certificate issued by the village panchayat. There is nothing on record to show that the notary who had attested the document Ex.34 was given the original. If the document Ex.34 is seen

closely, an impression is also created that this may be the true copy of the xerox copy and plain reading of this document also does not reveal that the birth of the victim was registered with village panchayat in couple of days after the birth of the victim. The language of the certificate indicates that the birth date mentioned in the certificate is one which is mentioned in the application made by the person who had applied for such certificate. For want of any evidence other than Ex.34, whether it was safe for the learned trial Judge to conclude as to the age of the victim on the date of offence, is the question. However, according to learned Additional Public Prosecutor, this question has been addressed properly by the learned trial Judge.

4. To evaluate the evidence led during the course of trial and the submissions made before this Court, it would be beneficial to state the gist of the case of the prosecution which is reflected in the charge Ex.6. Relevant part of the charge, if is reproduced, it says that :

During the period between 08-00 hrs. and 12-00 hrs. on 08th January 2004, you the accused with a mala fide intention to marry the victim Shabana, aged about 15½ years, daughter of the complainant, had kidnapped her from the lawful guardianship of the complainant from Street No.18, Sanjaynagar Jhunpadpatti, Outside Sahara Gate, though she was a minor girl by alluring her with an intention to marry her and to commit sexual intercourse with her kidnapped her from the lawful guardianship of the complainant, and by taking her to your native, you have committed offences punishable under Sections 363, 366 and 376 of the Indian Penal Code.

5. Even as per the charge framed, the victim, according to the prosecution, was aged 15 years and 06 (six) months. It is in evidence that the appellant was of 20 to 21 years of age, and

both of them were residing in slum, popularly known as 'Jhunpadpatti' outside Sahara Gate, Surat City. The said slum area was known as 'Sanjaynagar' and the victim was residing in Street No.18 of the said Sanjaynagar. The address of the appellant does not show any street number. But he is shown to be resident of the very Sanjaynagar. It is clear from the evidence that the appellant and the victim were knowing each other since long and medical evidence led by prosecution does not carry the case of the prosecution any further so far as the charge of offence punishable under Section 376 of the Indian Penal Code is concerned. Obviously, there were no marks of violence and the victim was matured enough to enter into sexual relationship. She was found pregnant on the date on which she was examined by the doctor after registration of the offence on the request made by the Investigating Officer. On 08th January 2004, the PW-2-complainant Sayarabibi Shaikh Salim found that her daughter i.e. victim girl, is missing and it is alleged that her daughter perhaps was kidnapped after

administering some seductive drug. The complainant inquired at the residence of the appellant and it was found locked. This conduct of the complainant clearly suggests that the complainant must have suspected that perhaps the victim girl might have eloped with the appellant. The complainant PW-2 Sayarabibi and PW-1 Shaikh Salim Shaikh Yasin, parents of the victim, have denied the suggestion that the appellant and victim girl were knowing each other; and the appellant was doing some business near the house of the victim. The parents of the victim girl had attempted to trace out the victim girl for about 2 to 3 days. The appellant was also traced at his native place Chhatarpur, Jhans, whether he is available there or not. Thereafter, the FIR in question was lodged. So this is a case of delayed FIR and the complainant PW-2 Sayarabibi-mother of the victim girl, had opportunity to develop her own story and she has made a number of improvements in her deposition recorded on 03rd November 2004. It is relevant to note that earlier deposition of PW-

1 Shaikh Salim was recorded on 18th October 2004. So there was no reasonable gap between the deposition of PW-1 and PW-2. So while evaluating the evidence of PW-2 Sayarabibi, the learned trial Judge ought to have considered this aspect because she has claimed that she was able to procure her birth certificate from the village panchayat where the victim had born. The close reading of the examination as to registration of the birth of the victim indicates that the PW-2 has made exaggerations in narrating the details as to registration of the birth of the victim. She has denied that the birth of the victim was not registered with the village panchayat. But while answering this, she had voluntarily stated before the Court that she herself along with her mother had been to the village panchayat for getting the birth of the victim registered and both of them had gone for registration after two to three days of her birth. Whether the mother who has delivered a child would go to the office of the village panchayat to get the birth registered, that too in a remote village like

in the present case, or not. A prudent man's answer would be in negative. The evaluation of the evidence is nothing but an exercise which a normal prudent man would do on a set of facts if given for appreciation. She has claimed that her health was good. This is nothing but justification placed by her in support of her claim that she herself had been to the office of the village panchayat. The say of PW-2 Sayarabibi as to the birth date and time of registration of the birth ought not to have been accepted by the learned trial Judge, not only on aforesaid probabilities but also on account of conflict with Ex.34 because Ex.34 is nothing but a certificate in a printed form. The first part of the said certificate states that the victim girl is a domicile of village Varan, Tal.Bhusaval, State of Maharashtra. The second part of certificate says that the date of birth of victim is 12th June 1988 and the panchayat has certified the same. But the third crucial part makes the certificate clarified. There are printed options. The first option is “as per record of hospital” and the second

option is “as per birth register maintained by Kotval”. The authority which has issued the certificate has not mentioned in the certificate that the date of birth shown in the certificate is as per which option out of the aforesaid options i.e. as per the hospital record or birth register maintained by the village Kotval. The authority has entered the third clarificatoin which shows that the birth date is mentioned as per the date of birth mentioned in the application made by the applicant. The said certificate is issued on 12th January 2004 i.e. after occurrence of the incident in question. So this certificate ought to have been viewed with doubt as a created document or a document obtained by the mother of the victim girl after pursuing the village authorities. The date of birth mentioned in such a certificate ought not to have been accepted as the actual date of birth of the victim girl. The notary Shri Ratilal N. Parmar has mentioned that it is the true copy as per the original. Even the said notary has not cared to put up any date while signing the true

copy or putting his seal on the true copy made by him. So if the evidence of PW-2 Sayarabibi is read along with the deposition of the Investigating Officer, it is clear that the Investigating Officer had insisted for production of such certificate. The plain reading of the evidence of the Investigating Officer gives an impression that perhaps he was not even ready to chargesheet the appellant for the offence punishable under Section 376 or 366 of the Indian Penal Code and, therefore, he was insisting the birth certificate or any evidence as to the age of the victim girl. The PW-2 Sayarabibi in the cross-examination has admitted one fact which reveals that the victim girl was not completely illiterate girl. She had gone to school because she had stated that the victim had not studied much. Who prevented the Investigating Officer from collecting the evidence as to the date of birth of the victim from the school where she must have studied. Ex.34 was tendered by Investigating Officer in the evidence. It was seriously objected by the defence counsel. The authority to tender the

document Ex.34 by the Investigating Officer was also challenged by the defence counsel. Ex.10 which is the list of documents tendered by the Public Prosecutor Shri K.A. Buddhadev, shows the date i.e.03rd November 2004, meaning thereby, the day on which the deposition of PW-2 Sayarabibi was recorded, the said documents were tendered for the first time in evidence by the prosecution and these documents were not there on the date of examination of PW-1 Shaikh Salim. Obviously, therefore, he has not mentioned anything about the so-called registration of birth of the victim and a certificate issued by the panchayat. This Court has reason to believe that the father of a child must be aware about the availability of such certificate. On the contrary, the time gap between the deposition of PW-2 complainant Sayarabibi and PW-1 Shaikh Salim and the fact that the list of documents was not produced till 03rd November 2004, make the birth certificate of the victim girl doubtful. No reliance can be placed on such documents, especially when the prosecution has attempted

to play a game of hide and seek. Why the original birth certificate has not been collected by the Investigating Officer, is neither answered by the Investigating Officer himself when a pointed query was raised in this regard nor by the Court while evaluating the evidence of the Investigating Officer and PW-2 Sayarabibi. In the same way, non-production of evidence as to the age which would have been collected from school, would positively go to the root of the strength of the evidence led by the prosecution to prove one fact that the victim was below 16 years of age. The production of such certificate either may have corroborated the certificate Ex.34 or may have controverted the same. This fact situation, obviously, would give rise to two possibilities. The first possibility is that the Investigating Officer must have collected such evidence from the school but as the date of birth mentioned in the school leaving certificate is in conflict with the date mentioned in the certificate issued by the panchayat, the prosecution may have kept

curtain on it. The second possibility is that the Investigating Officer may not have attempted to collect such evidence. The first possibility would affect the case of the prosecution and would make the prosecution case doubtful as to the date of birth shown in Ex.34 and the second possibility would help the appellant; and the appellant can effectively submit that this inaction on the part of the Investigating Officer has resulted into serious prejudice to him. It is not the duty of the appellant to prove that the victim was more than 16 years of age or had completed 16 years of age but it is the duty of the prosecution to prove that the victim was below 16 years of age.

6. The pregnancy of 06 (six) weeks speaks clearly about the consent. Merely because the victim girl was pregnant and the doctors were not able to carry out the ossification test perfectly by taking the X-rays of the relevant joints of the body of the victim girl, would not make the prosecution case strong in proving

the fact that the victim girl was below 16 years of age. When it is the case of the prosecution that the victim girl was 15½ years of age as per the charge framed and her other physical condition on medical examination is found of a matured girl, it was not safe for the Court to conclude that she was about 15 years of age. PW-7 Dr.Anjani Srivastava has not stated that the victim girl was aged 15 years on examination. She has simply stated that as per the police yadi the victim girl aged about 15 years was brought before her for examination. She has not proved the age of the victim girl. The learned trial Judge has committed a grave error in appreciating the say of PW-7 Dr.Anjaniben Srivastava. Not a single question was asked to even PW-11-Dr.Mohan Chauhan as to the age of the victim girl. Obviously, none of these two doctors was able to state anything positively as to the age of the victim girl.

7. The history given by the victim girl to the Doctor when she was taken for medical

examination and her conduct of developing relations with the appellant gradually, makes the prosecution case doubtful. When the document at Ex.34 is not found a reliable document, the conviction mainly based on this document cannot sustain in the eye of law.

8. It is rightly argued by Shri S.C. Sharma, learned counsel appearing for the appellant, that the learned trial Judge ought not to have exhibited this document as the same was the secondary evidence and there was no evidence as to either loss or destruction of the original document by any of the prosecution witnesses. PW-2 Sayarabibi or Investigating Officer could have stated that as the original is either lost or destroyed, it is not possible for the prosecution to produce the original again before the Court and therefore, true copy has been produced. For the sake of argument, if the Court accepts that this secondary evidence could not have been ignored even then the clarification added by the authority which has issued the certificate, it is also clear that

the birth of the victim was not registered after her birth with village panchayat, the learned trial Judge ought not to have given weightage to the birth date mentioned therein. This Court is of the view that the finding arrived at by the learned trial Judge is based on erroneous appreciation of evidence and such a finding cannot sustain in the eye of law. This Court and even the Apex Court has observed in cases where the victim is more than 15½ years of age or about to complete 16 years of age and the appellant is either a teenager or a young man of either 20 or 21 years of age, the Court can take a view to impose a lighter punishment than minimum prescribed. The learned trial Judge has not even considered all the relevant crucial aspects. Even the prosecution could have proved the case beyond reasonable doubt. Perhaps this Court may have reduced the quantum of punishment, but as this Court is not inclined to uphold the judgment and order of conviction itself, it is not necessary to enter into detailed discussion as to the finding recorded by the learned trial Judge with regard

to quantum of punishment imposed by the learned trial Judge. According to Shri S.C. Sharma, learned counsel appearing for the appellant, at present the appellant is in prison since the date of his arrest i.e. 13th March 2004, and therefore, he may be set at liberty forthwith if he is not required by the jail authorities for any other offence.

9. So in view of aforesaid observations and discussion, the present appeal is allowed. The judgment and order of conviction and sentence dated 27th December 2004 passed by the learned Joint District and Additional Sessions Judge, Fourth Fast Track Court, Surat, in Sessions Case No.66 of 2004, is quashed and set aside. The appellant is ordered to be acquitted from all the charges levelled against him in respect of the offence in question. As the appellant at present is in jail, he is ordered to be set at liberty forthwith, if he is not required for any other offence. The amount of fine, if any paid by the appellant, be refunded to the appellant on his proper identification.

(C.K. Buch, J)

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